Michigan Law Review

Volume 58 | Issue 4

1960

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MICHIGAN LAW REVIEW

Vol. 58 FEBRUARY 1960 No. 4

BID DEPOSITORIES

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THE decision by the United States District Court for the Southern District of California in the civil antitrust case of *United States v. Bakersfield Associated Plumbing Contractors, Inc.*[1] brought in its wake considerable renewed interest, discussion, and activities concerning "bid depositories." This is apparent from the trade press[2] and from inquiries reaching the Antitrust Division, including a number of requests for clearance of bid depository plans through so-called "railroad release" procedures. Even more recently, institution of the civil and criminal antitrust cases of *United States v. Arizona Masonry and Plastering Contractors' Association* provided further stimulation.[3] The term "renewed" interest and activities is used because interest and activities in this field had been vivid from the time of demise of the NRA codes[4] until the pre-war years. Perhaps, that interest continued all along, and only the activities subsided because of the institution, around 1940, of numerous antitrust actions involving bid depositories.[5] Has the *Bakersfield* decision given a new lease on life to bid depositories?

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1 S.D. Cal., Civ. No. 1479-ND, 1958 TRADE CAS. ¶69,087, final judgment by Jertberg, J., dated May 26, 1958, modified final judgment by Yankwich, J., dated Dec. 22, 1958, 1959 TRADE CAS. ¶69, 266.

2 See Glassie, "The Legal Line," QUALIFIED CONTRACTOR, Oct. 1958, p. 77; Glassie, "Bidding Plan Cleared," QUALIFIED CONTRACTOR, Dec. 1958, p. 104; Lamb, "Danger Still Lurks in Bid Depositories," PLUMBING AND HEATING BUSINESS, Feb. 1959, p. 7; "New Optimism vs. New Trouble," PLUMBING AND HEATING BUSINESS, July 1959, p. 77.

3 D.C. Ariz., Crim. No. C-15290, indictment returned June 2, 1959; and D.C. Ariz., Civ. No. 3066-PHX, complaint filed June 2, 1959. See comment in PLUMBING AND HEATING BUSINESS, July 1959, p. 7.

4 Schechter Corp. v. United States, 295 U.S. 495 (1935). See Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., pp. 23-24 (1953); S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., pp. 159-160 (1955).

5 See cases cited and discussed infra.

Before discussing the details of that judgment, it will be well, first, to describe the commercial problems and issues which lie behind the phenomenon of "bid depositories." We then shall review the past twenty or so years' experiences with those problems in the Congress of the United States, in the Antitrust Division, and in the federal courts. Such a historical background will help in evaluation of the *Bakersfield* judgment and in reaching conclusions.

I. Bid Depositories, Bid Shopping, and Bid Peddling

"Bid depository" is not a technical term. There are about as many types of bid depositories as there are groups creating them. Basically, it is a facility, created and operated by a trade association or by an independent agency, such as a bank, which collects bids for the sale and installation of construction supplies from subcontractors to general contractors. Such bids or copies of bids on any given job for which bids have been invited are to be sent to the depository a short time prior to the date set by the general contractor or awarding authority for the opening and award of the subcontracts. The depository keeps the subcontractors' bids closed and confidential until just before or just after the hour of the bid opening by the general contractor. It then opens and tabulates those bids, making the bid quotations known to all subcontractors participating in the depository and, sometimes, to other interested parties. Once deposited, bids usually may not be withdrawn, or may be withdrawn only under penalty of certain fines. Administrative costs of the depository are covered by fees collected from successful bidders. To facilitate compilation of the subcontractors' bids, special bid forms sometimes are provided.

The principal function of bid depositories is the inhibition of so-called "bid peddling" and "bid shopping" practices.[6] Since depositories require participating subcontractors to file definitive subbids prior to the general contractors' opening of those bids, there is little chance for last-minute haggling. Further, since any

[6] In trade circles, those terms are understood to mean offers, requests, and negotiations for contracts at prices lower than those quoted in bids submitted in response to the original invitation. If the initiative is taken by the firm which would perform the work, it is called "bid peddling"; if by the agency or firm for which the work is to be done, it is called "bid shopping." Of course, it takes both parties to agree on work to be performed at a cut price. See Report of the Federal Trade Commission, dated May 20, 1952, in S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., pp. 274-275 (1952); S. Rep. 617, to accompany S. 1644, 84th Cong., 1st sess., p. 6 (1955); H. Rep. 434, to accompany H.R. 7168, 85th Cong., 1st sess., p. 5 (1957).

discrepancies between the filed bid quotations of participating subcontractors and the prices ultimately charged by any of them are likely to be detected, post-award bid shopping among depository members is also inhibited. And if the general contractor awards the job to a subcontractor who had not filed a bid with the depository, the unsuccessful subcontractors may infer that he had used their bids for "shopping" and refrain from competing for his business in the future. Another function of bid depositories is to serve as a convenient agency from which general contractors can obtain a maximum number of subbids.

Bid shopping and bid peddling has long been frowned upon and marked as an "unethical practice" by some organizations of interested trades.[7] A series of reasons for condemning those practices has been advanced. (a) The preparation of a bid involves the time and costs necessary to analyze the job, to estimate the price of required materials and labor, and to calculate the bid quotation in the light of those factors and of the competitive situation. Parties who engaged in bid peddling or shopping may use such bid quotations prepared by others for bargaining purposes, without going to the trouble of preparing their own, independent calculations. Hence, bid peddling and bid shopping are said to increase the risk that the contractor who actually prepared a bid may lose his investment therein.[8] (b) General contractors are interested in obtaining subbids timely enough to prepare their own bids to the awarding authority on the basis of the best subbid available. However, in many instances when bid shopping is feared, general contractors are said to be handicapped in preparing their bids by delays in the submission of subbids. For "[every subcontractor] holds his bid until the last minute so there will be no time for [bid] shopping."[9] (c) There is evidence that some subcontractors refrain from submitting bids for jobs on which they anticipate bid shopping. To that extent, competition among sub-

[7] AMERICAN INSTITUTE OF ARCHITECTS, HANDBOOK OF ARCHITECTURAL PRACTICE, Bk. III, p. 702 (1958); CODE OF ETHICS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, §3.

[8] Even in the absence of bid shopping, of course, he has no assurance that his bid will be successful and, in case of subbids, that the general contractor to whom he submits his bid will be the successful bidder.

[9] Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., p. 23 (1953). This applies of course only to bid shopping prior to the final award of the general contract. See also S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., pp. 81, 90, 111, 112 (1955).

contractors is diminished.[10] (d) If bid shopping is expected by the subcontractors, they may pad their bids to allow for reductions in the course of further negotiations. Hence, it has been said, bid shopping tends to make bids too high.[11] (e) After the general contract has been awarded, the successful general contractor has strong bargaining powers. Prior to the award the pressure upon general contractors and subcontractors is about equal, and the plurality of competing general contractors tends to diffuse their power over subcontractors. With the general contract in his pocket, however, the general contractor has something to give to a subcontractor willing to settle for less than the lowest subbid.[12] (f) Situations may arise in which a prime contractor submits his bid to the awarding authority on the basis of subbids received by him, obtains the general contract on that basis, then succeeds through bid shopping or bid peddling in having the subcontractor's work done at a reduced price. Such a price reduction may create a windfall profit for the prime contractor, instead of a savings for the awarding authority or owner.[13] Those are the principal arguments adduced by parties interested in condemning and suppressing bid shopping and bid peddling. However, as it will be pointed out below, there is another side.

From the records of the Congress[14] it is clear that the parties most strongly interested in creating bid depositories and in eliminating bid peddling are those connected with the mechanical

[10] This was the main argument advanced in favor of enactment of a Federal Construction Contract Act. See S. Rep. 448, accompanying S. 848, 83d Cong., 1st sess., p. 2 (1953); H. Rep. 892, accompanying H.R. 1825, 83d Cong., 1st sess., p. 4 (1953); S. Rep. 617, accompanying S. 1644, 84th Cong., 1st sess., p. 3 (1955); H. Rep. 2362, accompanying S. 1644, 84th Cong., 2d sess., p. 3 (1956); S. Rep. 1119, accompanying H.R. 7168, 85th Cong., 1st sess., p. 7 (1957); H. Rep. 434, accompanying H.R. 7168, 85th Cong., 1st sess., p. 5 (1957).

[11] H. Rep. 434, accompanying H.R. 7168, 85th Cong., 1st sess., p. 5 (1957). Cf. Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070 at 1075, 1089 (1947).

[12] ". . . while bid-shopping prior to the award may be unethical, at that time prime bidders and the sub-bidders are substantially on the same footing. After the award the situation is not equal. . . ." S. Rep. 617, accompanying S. 1644, 84th Cong., 1st sess., p. 6 (1955). In the S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 206 (1955), a witness stated: ". . . it is not the same economic problem. Before the award of the contract, the subcontractors and the prime contractors stand on an equal footing in that the prime contractor still needs the subbids. After the award, the prime contractor has a monopoly, and such a practice is a clear unfair trade practice, more than a matter of ethics." A witness in the Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., p. 23 (1953), said: ". . . after he gets the contract, he can say to the subcontractors, 'You can do business my way, or we won't do business at all.'"

[13] Cf. Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070 (1947).

[14] All Federal Construction Contract bills, discussed infra, were advocated primarily by electrical, plumbing, and sheet metal contractors' groups. The Bakersfield case itself, typically, involved plumbing, sheet metal, and electrical contractors' associations. Cf. also numerous other antitrust cases involving bid depositories, cited and discussed infra.

specialty contractors' trade, i.e., electrical, plumbing, and sheet metal contractors.[15] Members of those trades usually participate in building projects as subcontractors, submitting their bids to general contractors, although that procedure is by no means universally followed.[16] Members of the non-mechanical specialty contractors' trades, such as masons, bricklayers, floor layers, roofers, lathers, etc., also function as subcontractors and sometimes create bid depositories.[17] Presumably, all those subcontractor groups occasionally experience "bid shopping" by general contractors, and some non-mechanical specialty subcontractors might disagree with a Senate Report which stated:

> "This condition [bid shopping] does not appear to exist to the same significant degree outside the mechanical specialty contracting field because normally the general contractor does not find it necessary to procure subbids for work other than mechanical specialty work. . . ."[18]

There may be, however, a general difference between the mechanical and the non-mechanical groups when it comes to dealing with general contractors or awarding authorities. It has often been said that the preparation of bids for mechanical work is more costly than the preparation of non-mechanical bids and that, therefore, the awarding of contracts to firms which may not even have troubled to prepare a bid is more unfair and damaging to mechanical than to non-mechanical contractors.[19]

[15] S. 1644, 84th Cong., 2d sess. (1956), §3 (3), contained the following definition: "The term 'mechanical specialty work' in connection with a construction contract means all plumbing, heating, piping, air conditioning, refrigerating, ventilating, and electrical work, including but not limited to the furnishing and installation of sewer, drainage and water supply piping and plumbing, heating, piping, air conditioning, refrigerating, ventilating and electrical materials, equipment and fixtures."

[16] See "Memorandum on Procedures, etc." submitted on behalf of the National Electrical Contractors' Association and inserted as Appendix to S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 223 (1955).

[17] See the Arizona cases, cited note 3 supra, and cases involving tile contractors, marble contractors, mason contractors, plasterers, cited infra.

[18] S. Rep. 617, Federal Construction Contract Act, 84th Cong., 1st sess., p. 10 (1955).

[19] "Estimating with regard to these specialties is an expensive process, requiring highly trained technicians to estimate the cost of various mechanical specialty work. This expensive process, however, is not the case in calculating and assembling the cost of brickwork, plastering, excavation, etc., each of which can be figured accurately on a mathematical basis." [H. Rep. 434, 85th Cong., 1st sess., p. 10 (1957)]. See also S. Rep. 448, 83d Cong., 1st sess., p. 6 (1953); H. Rep. 892, 83d Cong., 1st sess., p. 8 (1953); S. Rep. 617, 84th Cong., 1st sess., p. 10 (1955); H. Rep. 2362, 84th Cong., 2d sess., p. 7 (1956); S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., p. 74 (1952). But cf. H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on S. 1644 and Similar House Bills, 84th Cong., 2d sess., p. 158 (1956); S. Hearings on S. 2907, supra, at p. 278; Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., p. 168 (1953).

Bid shopping and bid peddling, although condemned as "unethical practices" by the canons of some trade organizations,[20] are nevertheless forms of vigorous price competition and, as such, supported by national antitrust policies and statutes. Any efforts to suppress or prevent those practices must come to grips with that fact. Such efforts have been made, it seems, mainly along the following approaches, each of which has its limitation: (1) through persuasion and education among members of interested groups, including the canons against "unethical practices" referred to above; (2) through statutes requiring either that specialty work be bid separately and directly to the awarding authorities or that the prime contractor name the specialty subcontractors on whose subbids his bid is based and whom he will use;[21] and (3) through the organization of bid depositories. Education and ethics, however, vary with the individuals concerned; and penalizing violations under a "code of ethics" which restricts price competition may be unlawful. A spokesman for the mechanical specialty contractors said:

> "No sanctions on a violator of a code of ethics are permitted under our antitrust laws. The Antitrust Division has been more than active in every case in which any such effort has been made, to enforce or even persuade contractors that they must bid in a certain way. . . . We would love to cooperate, but we are not interested in going to jail. . . ."[22]

As far as statutes are concerned, a few states have enacted legislation requiring prime contractors to specify the names of their subcontractors and the work to be performed by the latter.[23] Since consent of the awarding authority is required for a change in subcontractors, bid shopping and bid peddling is inhibited to some degree. However, those statutes govern the award of certain types of public construction contracts only, and they restrict bid shopping and bid peddling only after award of such contracts.[24] One

20 See note 7 supra.

21 Cal. Govt. Code (Deering, 1958) §4104; Mass. Laws Ann. (1957; Supp. 1959) c. 149, §§44A-44D; N.J. Stat. Ann. (1955) tit. 52, §32-2; 55 N.Y. Consol. Laws (McKinney, 1940) §135; N.C. Gen. Stat. (1958 repl.) §143-128; Ohio Rev. Code (Page, 1953) tit. 1, §153.50; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §1003.

22 Testimony by Mr. Henry H. Glassie at S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 208 (1955).

23 See note 21 supra.

24 They also fail to restrict bid peddling between subcontractors and their sub-subcontractors, materialmen and suppliers. Cf. S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 113 (1955); H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, H.R. 3339, H.R. 3340, H.R. 3810, H.R. 4313, 85th Cong., 1st sess., p. 117 (1957).

prominent general contractor, discussing such a statute, publicly expressed the view that "it has not accomplished a solitary thing."[25] The third approach to restricting bid shopping and peddling, namely, bid depositories, may appear to be the most effective. They also are subject to limitations and pitfalls, on which the further discussions herein are intended to shed some light.

II. BILLS AGAINST BID SHOPPING IN THE CONGRESS AND ARGUMENTS IN DEFENSE OF BID SHOPPING

In the Congress of the United States, the fight against bid shopping and peddling has been connected, for more than twenty years, with attempts—so far fruitless—to pass a Federal Construction Contract Act or a Federal Construction Contract Procedures Act.[26] While the primary purpose of the various proposed bills was to improve government construction procedures and to get the most for the taxpayers' money, the acknowledged secondary purpose was to prevent bid shopping and peddling.[27] Discussion of the provisions of each of the bills in question falls outside the scope of this paper. Suffice it to say that, among other things, they all required prime contractors to name in their bids the mechanical specialty subcontractors to be used on the given job, after the pattern of the state statutes mentioned above. Those bills were strongly advocated by representatives of mechanical specialty contractors and opposed by general contractors.[28] The federal agencies most directly concerned with construction also took a negative attitude toward those bills, mainly for fear of administrative com-

25 Mr. R. A. Smith, Los Angeles, referring to the California statute in S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 176 (1955). The California statute is reprinted at p. 263.

26 For detailed statements of legislative history, see H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, H.R. 3339, H.R. 3340, H.R. 3810, H.R. 4313, 85th Cong., 1st sess., pp. 98, 99, 116, 117 (1957); S. Rep. 1119, accompanying H.R. 7168, 85th Cong., 1st sess., pp. 2, 3 (1957).

27 See, e.g., the statement by Senator Kilgore, Chairman: "The primary purpose of the proposed legislation is to effect a procedure under which Federal works may be erected at the lowest possible cost and under which prime contractors and subcontractors alike will be protected against the unfair trade practice of bid shopping." S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 3 (1955). In S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., p. 8 (1952), Senator Sparkman, a sponsor of the bill, stated: "Section 3 of the bill is designed to abolish the practice of bid shopping." See also the report of the Comptroller General, id. at 271.

28 "There has always been a fight by general contractors every time one of these bills has been submitted." [Senator Kilgore, Chairman, in S. Hearings on S. 1644, cited in note 27 supra, at p. 196] However, in March 1957, the 38th annual convention of the Associated General Contractors of America resolved not to object to the principles stated in five bills then pending in the House, which were companions to S. 7168. [S. Rep. 1119, 85th Cong., 1st sess., p. 3 (1957)].

plications, increased expenses, and legal entanglements.[29] The Department of Justice repeatedly took the position that those bills represented a policy matter for Congress to decide, and that it preferred to make no recommendation.[30]

As early as 1932, such bills were introduced in the 72d Congress; there were hearings and a favorable House Report, but no action.[31] The 75th Congress passed a similar bill in 1938; however, it was vetoed by the President:[32]

> "While I recognize the evils of 'bid-shopping' and favor any provision which will promote the prompt payment of the obligations of contractors for labor and materials, it is believed that this bill will have no tendency to accomplish either of its objects and will merely create a multitude of administrative difficulties. . . ."

Of the bills introduced in subsequent Congresses, S. 1644 in the 84th Congress came close to enactment. It passed the Senate but failed in the House. Again, in the 85th Congress, H.R. 7168 passed the House on voice vote, but the corresponding Senate Bill S. 2300 failed of passage.[33]

In various committee hearings on those bills, the pros and cons of bid shopping and bid peddling were discussed. The principal evils attributed to such practices have been described above. There follow some of the factual contentions on the other side. (a)

[29] See, e.g., S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess. (1952), containing adverse recommendations from the Departments of Defense, Interior, General Services Administration, Atomic Energy Commission, and the Comptroller General; Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848, 83d Cong., 1st sess. (1953), containing adverse recommendations from the Secretary of the Army, General Services Administration, Atomic Energy Commission, and General Accounting Office; S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess. (1955), containing adverse recommendations from the Department of Defense, Atomic Energy Commission, and General Services Administration; H. Hearings Before a Subcommittee No. 2 of the Committee on the Judiciary on S. 1644, H.R. 7637, H.R. 7638, H.R. 7668, H.R. 7676, H.R. 7686, H.R. 7693, 84th Cong., 2d sess. (1956), containing adverse recommendations from General Services Administration, Comptroller General, Atomic Energy Commission, Departments of the Army and of the Interior; H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, H.R. 3339, H.R. 3340, H.R. 3810, H.R. 4313, 85th Cong., 1st sess. (1957), containing negative recommendations from the Departments of the Army and of the Interior, General Services Administration, and Atomic Energy Commission.

[30] See Deputy Attorney General Rogers' letter to the Chairman, dated May 15, 1957, in H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, etc., 85th Cong., 1st sess., p. 95 (1957); and letters from the Department of Justice contained in other Hearings, cited in note 29 supra.

[31] H.R. 4680, H.R. 9921; S. 4081, S. 1639. H. Rep. 1272 on H.R. 9921, 72d Cong., 1st sess. (1933).

[32] H.R. 146. Veto message of June 25, 1938, contained in 83 CONG. REC. 9707-9708 (1938).

[33] See S. Rep. 1119, accompanying H.R. 7168, 85th Cong., 1st sess. (1957).

Subbids frequently are not precise or not responsive to the specifications; therefore, further negotiations between prime and subcontractors are necessary for clarification.[34] (b) In preparing their bids under time pressure, prime contractors often are unable to check a subcontractor's reputation, previous experience, and credit standing, causing rejections of subbids which, upon subsequent inquiry, may prove to be quite acceptable.[35] (c) Awarding authorities often invite bids on alternates, and since different subbids may be low on different alternates, negotiations between prime contractor and subcontractors are necessary after determination of the specific alternate to be used.[36] (d) The average costs of estimating specialty work may not be as significant as contended and they represent a normal part of the costs of competing in that type of business.[37] (e) Prime contractors cannot rely on "first-round" subbids, which generally are too high; therefore, general contractors must prepare their bids according to their own estimates of the cost of specialty work and negotiate subcontracts for such work later.[38] (f) Negotiations between prime and subcontractors prior to formulation of the prime bids tend to lower construction costs to the awarding authority or owner.[39]

[34] See S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., pp. 150, 164 (1952); Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., pp. 110, 144-145 (1953); S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 152 (1955); H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, H.R. 3339, H.R. 3340, H.R. 3810, H.R. 4313, 85th Cong., 1st sess., p. 145 (1957).

[35] See S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 159, 173 (1955); Joint Hearing on S. 848 and Similar House Bills, 83d Cong., 1st sess., pp. 166-167 (1953).

[36] See S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., pp. 136-137, 196 (1952); Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., pp. 144-145 (1953); S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., p. 151 (1955); H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on S. 1644 and Similar House Bills, 84th Cong., 2d sess., pp. 208-209 (1956).

[37] See Report of the Federal Trade Commission in S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., pp. 274-275 (1952); id., pp. 137, 141; id., p. 151; Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., p. 146 (1953); H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on S. 1644 and Similar House Bills, 84th Cong., 2d sess., p. 210 (1956).

[38] See Report of the Federal Trade Commission, note 37 supra; Report of the Acting Comptroller General, id., p. 272; id., p. 151; Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., pp. 153-154, 168 (1953).

[39] See S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 2907, 82d Cong., 2d sess., pp. 112, 172; Report of the Assistant Secretary of the Interior, in H. Rep. 2362, 84th Cong., 2d sess., p. 19 (1956).

We cannot assume that the qualified witnesses who propounded the arguments on one side of the "bid shopping and bid peddling" controversy are entirely right, and that those who propounded the arguments on the other side are entirely wrong. Therefore, their seemingly conflicting contentions, mentioned above, must be reconciled on the basis that such practices sometimes may be necessary and beneficial, while sometimes they may be, and in certain instances actually have been, unfair, detrimental, or both,[40] all depending upon the particular circumstances of a given situation.

III. ANTITRUST DIVISION ACTIONS INVOLVING BID DEPOSITORIES

Antitrust law enforcement cannot be shaped *in vacuo*. Before prosecuting any antitrust case, the Department of Justice considers the particular attending circumstances and the equities, in addition to the law involved. When it comes to cases concerning bid depositories, the equities of bid shopping and bid peddling are pertinent but, as we have seen, their weight may fall on either side of the scales. Also pertinent, however, are other practices and activities which frequently surround bid depositories and which fall rather on the dark side of the bid depository picture. They include practices or agreements of price fixing, bid rigging, allocating markets or customers, and of boycotting or otherwise conspiring against or with competitors, suppliers, customers or labor groups in restraint of trade. The records show that in the past twenty years at least twenty-eight bid depository situations[41] were prosecuted by the Department of Justice, civilly, criminally, or both.[42] It appears from the table below that all those cases, at least according to the pleadings, showed some feature or features well recognized as unreasonable restraints of trade, not merely the existence of a bid depository.

A. *Restraints on Free Price Competition*

According to the pleadings, all but two cases explicitly showed elements of price fixing or other price interference. In the majority of those cases, such elements were embedded among the terms of the alleged conspiracy;[43] in other cases they were alleged as

40 Cf. Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070 (1947).

41 See cases listed in the table below. [Note: "Blue Book" citations herein refer to CCH, THE FEDERAL ANTITRUST LAWS, WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES. Cases will be cited: "Blue Book No. ——."]

42 I.e., counting companion civil and criminal cases as one situation.

43 E.g., Blue Book Nos. 468, 470, 473, 477, 486, 492, 493, 499, 506, 507, 508, 537, 543, 919, 1070, 1149, 1449.

effects of the plan.[44] One of the two exceptions (Blue Book No. 545) involved a conspiracy to monopolize and a monopolization of the market, hence implicitly also impediments to free price competition. The other exception was the *Bakersfield* case, discussed below. It follows that bid depository antitrust cases, typically, involved some combination, conspiracy, or agreement in restraint of free price competition, with the depository serving as an ancillary device. Since any concerted tampering with the price structure is per se illegal under the Sherman Act,[45] such schemes represented an offense regardless of whether the participants flatly agreed on a fixed price,[46] adopted a predetermined formula designed to result in uniform prices,[47] left the decision of who should be the "low bidder" to an appointed agent,[48] permitted the bid depository to eliminate the lowest bids,[49] agreed to exchange bids in advance for purposes of price comparisons,[50] appointed a common estimator,[51] or used any other procedure directly interfering with independent, competitive pricing.

B. *Coercion or Boycott*

Again with the possible exception of two situations, all bid depository cases listed on the table showed elements of coercion or boycott against competitors of the parties interested in the depository plan. Firms engaged in the same business as those interested in the plan either were bound to use the depository or else they were excluded by group action from at least part of the market. In other words, those depositories were either compulsory[52] or exclusionary.[53] In either type of case, the freedom of competitive action of independent businessmen allegedly was restricted. Since group actions to exclude others from a market ("boycotts") are per se illegal under the Sherman Act,[54] exclusionary bid depositories are offensive, even if they provide for no other restrictions. As an illustration, consider the case listed under Blue Book No. 545. As previously mentioned, it did not directly involve price-

[44] E.g., Blue Book Nos. 479, 500, 501, 504, 518, 533, 1027.
[45] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 at 223 (1940).
[46] See cases listed in the table under Blue Book Nos. 473, 492, 499, 506.
[47] See Blue Book Nos. 477, 507, 1449.
[48] See Blue Book No. 506.
[49] See Blue Book Nos. 476, 477, and 500.
[50] See Blue Book Nos. 470, 501, and 1149.
[51] See Blue Book Nos. 470, 504, and 1070.
[52] Blue Book Nos. 476, 477, 478, 479, 499, 500, 501, 504, 919, 1027, 1070, 1149, 1242.
[53] Blue Book Nos. 468, 473, 486, 492, 493, 506, 507, 508, 518, 533, 543, 545, 1449.
[54] Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 (1914).

fixing. However, pursuant to the plan, tile contractors who were not members of the defendant association were deprived of labor by the union, of supplies by the manufacturers, and of business orders by the general contractors. A more clear-cut case of illegal boycott by multiple groups it is hard to imagine.

The same legal principles apply even if only one group, the members of the depository without help from manufacturers, labor unions or others, collectively coerce or boycott contractors.[55] Therefore, depositories must be condemned which impose fines or other penalties upon non-conforming contractors.[56] For example, the case in Blue Book No. 500 shows, among other things, that depository members were prohibited, under penalties, from submitting lower bids on a project after the depository had sifted their bids submitted to it. The agreement not to submit subsequent, reduced bids was of dubious legality under the Sherman Act; the group sanction to enforce it made it more so.

The two cases which showed no coercion on competitors, referred to above, involved devices to share the market, in one instance through a "joint venture arrangement,"[57] in the other instance through predetermined quotas.[58] Inasmuch as those arrangements may have been considered by the participants to be binding, they were in a sense compulsory, although not strictly speaking coercive. So viewed, every depository situation listed in the table showed that specialty contractors were compelled to abide by depository regulations, or that non-participating competitors were discriminated against, or that both those things were done.[59]

Numerous depository cases listed in the table show measures of coercion or boycott also against manufacturers, jobbers, general contractors, or labor. Thus, we find a number of cases in which the depository group would collectively threaten to withhold its patronage from suppliers who sell directly to general contractors,[60] to non-member specialty contractors,[61] or to member specialty contractors who failed to obey depository rules.[62] In one case, mem-

[55] United States v. New Orleans Insurance Exchange, (E.D. La. 1957) 148 F. Supp. 915, affd. 355 U.S. 22 (1957).

[56] E.g., Blue Book Nos. 473, 493, 499, 500, 506.

[57] Blue Book No. 470.

[58] Blue Book No. 537. Coercion was applied upon general contractors to enforce the plan.

[59] E.g., Blue Book Nos. 486, 492, 919, 1242, 1449.

[60] Blue Book No. 468.

[61] Blue Book Nos. 486, 493, 499, 506, 518, 533, 545.

[62] Blue Book No. 1149.

bers of the depository group forced manufacturers to sell materials directly to them and to by-pass jobbers;[63] and in another case they agreed to boycott suppliers selling products at prices not agreeable to them.[64] As with suppliers, so with customers. In a number of cases the depository group apparently considered itself to be powerful enough to demand that general contractors, owners, and awarding authorities do business with members of the group, to the exclusion of non-members and violators of the depository rules.[65] In most but not all of those instances, the leverage over customers stemmed from support by labor groups, about which more later. However achieved, such concerted pressures upon customers may constitute not only a conspiracy in violation of section 1 of the Sherman Act, but also a conspiracy or attempt to monopolize or monopolization in violation of section 2 of the act.

The cases of coercion or boycott by depositories *against* labor are few,[66] since successful coercion may align labor groups with depositories on the side of co-defendants or co-conspirators, making the situation one of "participation *by* labor groups."[67] The two cases of coercion against labor listed in the table, however, illustrate both illicit purposes for which such coercion might be used. In the case Blue Book No. 499, laborers working for non-members of the depository organization, a chapter of NECA, were boycotted to force non-member electrical subcontractors into the organization. And in the *Arizona Consolidated* case (Blue Book No. 1449), defendants allegedly agreed to blacklist and boycott masons and plasterers working for general contractors who do not accept bids exclusively from members of the defendant association.

C. *Allocation of Markets or Customers*

If subcontractors have reached a foregone conclusion as to who is to serve certain markets or specific customers, competitive bidding becomes a fraud and a sham. An agreement or conspiracy to that effect is likely to constitute a per se violation of the Sherman Act, since it affects the bid price and excludes all but one firm

[63] Blue Book No. 543.

[64] Blue Book No. 1070. This is an instance of "primary" rather than "secondary" boycott.

[65] Blue Book Nos. 468, 486, 492, 499, 506, 508, 537, 543, 545, 919, 1027, 1242, 1449.

[66] Blue Book Nos. 499 and 1449.

[67] See cases cited in note 71 infra. Blue Book No. 499 distinctly showed both boycott of certain laborers and cooperation by a labor union. As we know, the interests of the individuals and those of their organization do not always fully coincide.

from that particular business.[68] Bid rotation, quota allotments, fictitious bids, complimentary bids, and other devices might camouflage such arrangements, but if discovered they add to the evidence of intent and consciousness of guilt. Such proved to be the case in *United States v. Las Vegas Merchant Plumbers Association,*[69] one of the few fully litigated bid depository cases on the record. The indictment in that case contained allegations of a whole series of restrictions, but the convictions were upheld by the circuit court of appeals—as far as the sufficiency of the evidence was concerned—mainly because the record showed customer allocation, camouflaged by fictitious and complimentary bids, and price-fixing.[70]

D. *Participation by Other Groups in Conspiracy in Restraint of Trade*

As the table below shows, very few of the bid depositories attacked by the Antitrust Division for coercion or boycott relied on the strength of their members alone. In most cases, participation by labor groups,[71] suppliers,[72] or customers[73] was alleged. In contrast with the various restrictions previously discussed, agreements between specialty contractors or their associations and labor or other groups are not necessarily illegal in themselves. Trade associations, for instance, often negotiate on behalf of their members collective bargaining agreements with labor unions, which may be perfectly legal for them to do. Trade associations may legally enter also into purchase contracts with suppliers on behalf of their members, or they may negotiate with awarding authorities and other customers about standards and specifications of equipment to be supplied by members. However, the agreements and

[68] One of the leading decisions holding market allocations to be per se illegal under the Sherman Act is United States v. National Lead Co., 332 U.S. 319 (1947). Concerning customer allocation, cf. United States v. American Linen Supply Co., (N.D. Ill. 1956) 141 F. Supp. 105 at 114.

[69] (9th Cir. 1954) 210 F. (2d) 732, cert. den. 348 U.S. 817 (1954). Cf. United States v. New England Concrete Pipe Corp., D.C. Mass., Civ. No. 57-631-A, Crim. No. 57-156-A, Blue Book Nos. 1343 and 1349.

[70] For other cases involving allocation, see Blue Book Nos. 493, 506, 508, 537, 1070, 1149, 545. The case last cited charged attempted monopolization of the Detroit tile market, i.e., an allocation of that market by the defendant association to itself and its members.

[71] Blue Book Nos. 468, 473, 476, 477, 478, 479, 486, 492, 499, 500, 501, 504, 507, 508, 518, 533, 543, 545, 1070.

[72] Blue Book Nos. 545, 919, 1149.

[73] Blue Book Nos. 493, 1242.

collaboration with which we are concerned here are those that help tighten the rules or practices of bid depositories. It is difficult to imagine an agreement or joining of forces between a bid depository and representatives of labor, customers, or suppliers that would not serve some restrictive purposes or effects. Therefore, such alignments with other groups are most likely to make bid depositories vulnerable to antitrust attacks.

It appears that the most frequent of those alignments are with labor unions or their representatives. Such combinations are risky not only for the depository members but also for the unions. In a number of our depository cases, unions or union representatives have been named as defendants.[74] The statutory exemptions from the antitrust laws for labor do not shield labor officials who engage in deals with depositories to help enforce anticompetitive restrictions. It was so held in the *Las Vegas Merchant Plumbers* case, above. For the Supreme Court of the United States in *Allen Bradley Co. v. Local Union No. 3*,[75] decided that if unions combine with non-labor groups and "aid and abet businessmen to do the precise things which that [Sherman Antitrust] Act prohibits," they are liable under that act. It is, therefore, reprehensive for a depository group to persuade a union to withdraw laborers from contractors failing to obey the depository rules.[76] But even more stringently anticompetitive union arrangements have come to the attention of the Antitrust Division. For instance, it was alleged in *United States v. Employer Plasterers' Association of Allegheny County* (Blue Book No. 507):

> "The defendant labor unions entered into agreements with the defendant association . . . which . . . provided that union labor would be supplied solely to members of the association, notwithstanding the fact that numerous . . . contractors who were not members of the association were willing to agree to all requirements of the defendant labor unions. . . ."
>
> "The defendant association . . . with the knowledge, consent, and support of the defendant labor unions, arbitrarily excluded from membership certain . . . contractors who had sought membership in the association, with the result that

[74] E.g., Blue Book Nos. 468, 476, 486, 492, 499, 504, 507, 508, 533, 543, 545, 1070.

[75] 325 U.S. 797 at 801 (1945). Cf. United States v. Employing Plasterers Assn. of Chicago, 347 U.S. 186 (1954).

[76] E.g., in Blue Book No. 476, depository members who had complied with the rules were issued a "certificate of fair competition," which had to be displayed on the job site. Those contractors who failed to obtain such a certificate were to be deprived of union labor.

> such excluded contractors were unable to employ union labor necessary for participation in all building programs . . . where union labor was specified."[77]

Yet another purpose of depositories combining with labor groups may be to prevent general contractors from engaging in bid shopping and bid peddling. Thus, Blue Book Nos. 500 and 501 show cases in which union labor allegedly was to be withheld from any subcontractor attempting to do a job on which he had not submitted the low bid through the depository. No matter how unethical the subcontractors may consider bid shopping practices to be, they cannot lawfully prevent such practices by thus combining and conspiring with labor groups. For even if it be assumed that the subcontractors may have a legitimate grievance against bid shoppers, laborers do not, as long as proper wages and working conditions are offered.[78]

Only brief comment is required on depository situations which involve suppliers as participants. Materials and equipment obviously are essential to subcontractors' work. In all such situations listed in the table, manufacturers or jobbers were persuaded or coerced by the subcontractor groups to refuse their products to subcontractors not conforming with the rules and regulations of the groups. Such agreements and combinations, of course, are outright commercial boycotts and per se illegal under the Sherman Act.[79]

There remain the instances of participation by customers. Conspiring to coerce general contractors and owners into acceptance of bid depository rules is one thing, but to obtain their active cooperation would seem to require extraordinary persuasion. Although, as previously mentioned, participation by customers was alleged in two cases, the fact that no customers were named as defendants may indicate that their participation did not appear to be very strong.[80]

IV. SETTLED AND UNSETTLED PROBLEMS CONCERNING BID DEPOSITORIES

Since the middle fifties, the principle has been established that specialty contractors' depository arrangements may involve interstate commerce and thus be subject to federal regulation under the

[77] Comparable, but not involving a bid depository as such, was Local No. 175 v. United States, (6th Cir. 1955) 219 F. (2d) 431.

[78] Cf. United States v. Las Vegas Merchant Plumbers Assn., 325 U.S. 797 (1945).

[79] See authorities cited in note 54 supra.

[80] See the pertinent terms of conspiracy alleged in Blue Book Nos. 1027 and 1449.

Sherman Act.[81] The Government, of course, has the burden of proving the factual elements of interstate commerce. Previous misapprehensions about the applicability of the Sherman Act may account for the creation of some of the earlier depository schemes which, once it has been established that the Sherman Act applies, appear to be in glaring violation of that act.[82] Our table, however, shows also quite recent cases involving restrictions of the types which are clearly illegal. Some offenders apparently refuse to learn or to be deterred. That, however, is only part of the bid depository picture as it appears today. As indicated at the beginning of this article, there exist also honest differences of opinion and doubts about some aspects of bid depositories, particularly on the basis of the *Bakersfield* judgment. Those doubts can hardly concern the grosser types of restrictive arrangements, such as price-fixing, bid rotation, boycotts of non-members, collusion with labor groups, etc. Rather, those doubts revolve around the questions of whether depositories in the absence of such flagrant abuses may be legal, and if so, under what conditions. Although *Bakersfield,* so far, is the only litigated judgment in a civil antitrust case involving bid depositories, it is not the only source to be considered in answering the question of whether there may be innocuous bid depositories. The general position of the Antitrust Division regarding depositories and pertinent principles developed in other court opinions, are not eclipsed by one trial court's opinion on one specific depository.

A. *The Position and Policy of the Antitrust Division in the Past*

Of the numerous consent decrees referred to in the table, below, the greater number prohibit continuation of depository activities through injunctions which are qualified as to the purposes or effects of such depositories.[83] For example, the consent decree in *United States v. Employing Plasterers' Association of Allegheny County* (Blue Book No. 507) enjoined defendants from:

[81] United States v. Employing Plasterers Assn. of Chicago, 347 U.S. 186 (1954); United States v. Employing Lathers Assn. of Chicago, 347 U.S. 198 (1954); Las Vegas Merchant Plumbers Assn. v. United States, (9th Cir. 1954) 210 F. (2d) 732, cert. den. 348 U.S. 817 (1954); United States v. Northeastern Texas Chapter, NECA, (5th Cir. 1950) 181 F. (2d) 30 at 33-34; Local 175 v. United States, (6th Cir. 1955) 219 F. (2d) 431.

[82] In 1954, the unsuccessful argument was made, perhaps bona fide, in a case comparable to a bid depository case that ". . . the indictment did not charge a violation of the Sherman Act, but constituted merely a charge of local restraint and monopoly not reached by the Act." Local 175 v. United States, (6th Cir. 1955) 219 F. (2d) 431 at 433.

[83] Blue Book Nos. 468, 476, 477, 478, 497, 500, 501, 504, 507, 590, 628, 629, 1027, 1080, 1242.

> "(a) Creating, operating or participating in the operation of any association of . . . contractors maintaining a bid depository or any similar plan or device designed *to maintain or to fix the price* of plaster . . . *or to limit competition* in bidding . . . *or having the effect of limiting the awarding authority* in the free choice of plastering or lathing contractors."[84]

Again, the decree in *United States v. Heating, Piping and Air Conditioning Contractors Association of Southern California* (Blue Book No. 628) enjoined defendants from "creating, operating, or participating in the operation of any association or other group . . . maintaining a bid depository . . . . , or similar device, *designed to or having the effect* of, arbitrarily fixing or stabilizing the prices. . . ."[85] While, as a practical matter, it may be difficult or risky for defendants to operate any depository in the teeth of such injunctive provisions, in legal analysis those injunctions stop short of prohibiting depositories, absolutely. Hence, those decrees seem to indicate that some form of bid depository might be devised which is innocuous under the antitrust laws.

True, in a minority of cases, bid depositories have been prohibited in absolute terms.[86] We find, for instance, in *United States v. Santa Barbara County, NECA* (Blue Book No. 630), that defendants were enjoined from, among other things, "creating, operating, or participating in the operation of any association . . . maintaining a bid depository or similar common agency for the deposit of bids, or similar device." Even more flatly, defendants in *United States v. Tile Contractors Association of America, Inc.* (Blue Book No. 533) were not permitted "to create, operate or participate in the operation of any bid depository."[87]

Those decrees with absolute prohibitions against depositories do not, it is submitted, disprove the conclusion in the foregoing paragraph. Certainly, in view of the overlapping dates of the consent decrees with absolute and of those with qualified injunctions, it cannot be inferred from them that the Antitrust Division at some time changed its policy and position. The argument could

84 CCH 1940-1943 Trade Cas. ¶56,025, at p. 79. Emphasis supplied.

85 Id., ¶56,146, at p. 570. Emphasis supplied.

86 Blue Book Nos. 533, 543, 545, 567, 604, 630, 679, 1153.

87 Similar: Blue Book Nos. 543, 545, 604, and 1153. In some instances, the distinction between absolute and qualified injunctions against depositories depends on very subtle differences in language. For instance, compare the wording in Heating, Piping & Air Conditioning Contractors Assn., quoted in the text supra, with United States v. Southern Cal. Marble Association (Blue Book No. 567) containing the unqualified prohibition against "operating or participating in the operation of *any bid depository or* of any *scheme* . . . *designed* to maintain or fix . . . price[s]."

be made that absolute interdiction reflects the true view of the division, and that qualifications were written into some decrees as a result only of the particular defendants' negotiating skills or bargaining position. Although it is true that consent decrees are bargained compromises, the decrees with merely qualified prohibitions are so numerous that they cannot all be ascribed to deficiencies in the Government's cases or bargaining techniques. The natural explanation for the two divergent types of prohibitions is that different situations show different degrees of (1) risk to competition connected with the continuation of any bid depository, and (2) need to dissipate the effects of past wrongdoing. The more reprehensible the restraints practiced by defendants were in the past, and the more effective they were in strangling competition, the more stringent have to be the injunctions. In some cases it may well have appeared too risky to permit continuing operation of *any* depository by the defendants.

Other factors corroborate the view that the Antitrust Division never pursued a policy of condemning all bid depositories "per se." Thus, the consent decree in *United States v. Reno Merchant Plumbing and Heating Contractors, Inc.* (Blue Book No. 1027), in section V (A), recognized bid depositories, in principle, by enjoining defendants from "submitting copies of duplicate bids or otherwise disclosing such bids to any person *except a bid depository* (emphasis supplied)," although the decree in section VI prohibits, of course, all typical kinds of compulsory, exclusionary, or otherwise anticompetitive depository rules.[88] Furthermore, a flexible attitude toward depositories would be in keeping with the department's attitude toward the various Federal Construction Contract bills in past Congresses.[89] Since the department in reviewing those bills apparently felt that lawful means to inhibit bid shopping and bid peddling would not run counter to antitrust policies, bid depositories might be acceptable, if they were designed only to discourage bid shopping and free from restrictive rules and nefarious collateral activities. Finally, consistent with such thinking, the Antitrust Division recently granted "railroad releases" on at least two bid depository plans. The contents of those plans and the parties involved have not been published, but it is known that both those plans rely essentially upon publicity concerning the com-

[88] Such prohibited depository rules include: compulsory filing of bids with a depository prior to their submission to awarding authorities; restrictions as to time and place at which all bids must be filed; restrictions against bidding after bid opening; restrictions against revising bids after opening; imposition of penalties; etc.

[89] See text at note 30 supra.

peting subbids, and that they are free from any compulsory or exclusionary features. The fact that experienced businessmen and counsel worked out those plans would indicate that depository regulations need have no "teeth" and yet may afford some help against bid shopping.

B. *Court Opinions Prior to Bakersfield*

In the criminal antitrust case of *United States v. Northeast Texas Chapter, NECA,* (Blue Book No. 919), paragraph 27 (c) of the second count of the indictment charged as a separate term of the alleged conspiracy that defendants established a "Bid Registration System" under which each contractor would report his intent to submit a bid on any particular job, under penalty of a $1,000 fine for failure to do so. In its brief on appeal to the Fifth Circuit, filed July 1, 1949, p. 21, the Government argued that paragraph 27 (c) amounted to a charge of price-fixing violations, which "are *per se* a violation of the Sherman Act." Note, however, that in this case, which was appealed on the pleadings, a price stabilizing intent and function of the depository had been alleged, and that the depository had been alleged to be compulsory under heavy penalties. Moreover, the "Bid Registration System" was incriminated in the indictment at the very end of a lengthy list of palpably nefarious agreements, which that System allegedly "implemented." Thus, it can hardly be said that this indictment represented an attack upon depositories, as such. The Fifth Circuit, discussing the illegality of the various agreements charged, concluded:

> "Under the circumstances alleged, the price fixing agreements and the illegal inclusion of profits not related to the usual trade, are illegal. Likewise may be the boycott of those who will not operate in accordance with the plan. . . . Agreement upon prices and terms for the sale of lighting fixtures may likewise be shown to be illegal. In the very nature of the trade and commerce alleged, these agreements, some *per se,* and others as a matter of fact, constitute an illegal restraint. . . . What has just been said as to the agreements charged in the first count, is likewise applicable to those charged in the second and is based upon principles already well established in such cases."[90]

Although these legal conclusions are not as clear as they could be, it appears that the court emphasized the price-fixing and boycott

[90] 181 F. (2d) 30 at 33 (1950).

features,[91] which it considered as illegal per se, and probably deemed the registration scheme to be illegal only "as a matter of fact," i.e., under all the circumstances of the case. The opinion as a whole, however, reflects a skeptical attitude toward bid depositories. One may doubt whether any restrictive features in a depository arrangement would be acceptable to that court, even if prevention of bid peddling were advanced as the purpose of that arrangement.

There are some Supreme Court opinions which contain principles which may serve as a guide in determining acceptable and unacceptable characteristics of depositories. Thus, a depository arrangement which is compulsory upon members probably violates a principle announced in *Addyston Pipe & Steel Co. v. United States.*[92] The case involved an "auction pool," a bid depository of sorts, by which a group of pipe manufacturers determined who should submit the low bid in any given instance. The Court said:

> "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. *It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way* . . . that is regarded. All the facts and circumstances are, however, to be considered."[93]

The same principle of "freedom of trade" for the individual to conduct business in his own chosen way was emphasized in *Paramount Famous Lasky Corporation v. United States.*[94] The principle that price information concerning prospective contracts should not be exchanged among trade members, but that the exchange of statistics on past transactions may be innocuous if given wide publicity, was developed in *American Column Co. v. United States,*[95] *United States v. American Linseed Oil Co.*[96] and *Maple Flooring Association v. United States.*[97] Applied to a bid depository situation, this principle requires that information about the participants' bids should be tabulated and disclosed only after expiration of the time for submission of the

[91] Cf. the similar approach of the Ninth Circuit in its Las Vegas opinion, mentioned in the text at note 69 supra.

[92] 175 U.S. 211 (1899).

[93] Id. at 244. Emphasis added.

[94] 282 U.S. 30 at 42 (1930). Cf. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

[95] 257 U.S. 377 (1921).

[96] 262 U.S. 371 (1923).

[97] 268 U.S. 563 (1925).

bids to the awarding authority, and that it then should be made available to all persons interested. A further principle which should be observed in evaluating bid depository rules underlies the decision in *Fashion Originators Guild v. FTC*.[98] That case stands for the proposition that a scheme intended to prevent an unethical practice, namely, "fashion piracy," will nevertheless be vitiated if it violates the antitrust laws. Therefore, depositories designed to prevent the "unethical practices" of bid shopping and bid peddling are nevertheless illegal, if they are unduly restrictive. Although the Rule of Reason permits restrictions that are "ancillary" to a legitimate principal transaction,[99] it will not do to regiment an industry through depository rules,[100] especially if those rules are peremptory and bristle with policing and penalty provisions.[101] Since not all contract negotiations after bidding are unethical, depository rules to promote ethical and inhibit unethical practices ought to be as subtle as their aim.[102] It is submitted that all those principles are observed best by depositories which rely merely upon post-award publicity on bid data, like those on which the above referred to "railroad releases" were granted.

V. THE BAKERSFIELD CASE[103]

As in all previous antitrust cases involving bid depositories, the Government pleaded a combination and conspiracy which was broader than the mere formation of the depository and the adoption of its rules. The last four subparagraphs of paragraph 13 of the complaint charged (1) compulsion of members and of others to use the depository, (2) compulsion of members to boycott general contractors who fail to deal exclusively through the depository, (3) compulsion of general contractors to deal exclusively with the depository, and (4) exclusion of outsiders from sales and installation of plumbing supplies. Accordingly, the Government denied a request by defendants to admit that the alleged conspiracy con-

98 (2d Cir. 1940) 114 F. (2d) 80, affd. 312 U.S. 457 (1941).

99 See United States v. Addyston Pipe and Steel Co., (6th Cir. 1898) 85 F. 271 at 280, 282, 283, affd. 175 U.S. 211 (1899).

100 Cf. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 at 238, 240 (1899). Even at common law, ancillary restrictions are permissible only if they are consonant with the interests of the parties and of the public. Attorney General v. The Adelaide Steamship Co., [1913] A.C. 781 at 794.

101 Cf. United States v. Northeast Texas Chapter, NECA, (5th Cir. 1950) 181 F. (2d) 30. The Government specifically attacked such agreements, among other things, in the cases listed under Blue Book Nos. 468 and 504.

102 If "unethical dealing" reaches proportions of an unfair trade practice, regulation by the Federal Trade Commission may be invoked.

103 See citation in note 1 supra.

sisted merely of the agreement on the depository's rules. The first two subparagraphs of paragraph 13, however, alleged squarely the formation of the depository and the adoption and enforcement of its rules, which were attached to the pleading. As the proceedings unfolded, it became increasingly clear that the restrictive depository rules were the gist of the complaint. They were extensively discussed in the Government's pre-trial memorandum and post-trial brief, characterizing some of them as illegal per se. Perhaps more than in any previous antitrust case, the depository itself was at trial.[104]

In the post-trial brief the Government specifically argued also against those rules which most directly concerned bid peddling, namely, (a) a rule against submission of further bids to the general contractor within 120 days after the first bid opening, (b) a rule requiring the subcontractors to name their intended sub-subcontractors in their bids, and (c) a rule making acceptance of the lowest depository bid binding on the general contractors.

As to the alleged coercion and boycott, the Government named three subcontractors and one general contractor alleged to have been affected. Only two subcontractors and one general contractor testified to the effect that they had been excluded from some business for failure to join the depository.

In its Findings of Fact, the court found (with certain exceptions not applicable here): "[T]here is no evidence that: . . . (c) any manufacturer or supplier . . . has been coerced or intimidated . . . ; (e) any general contractor or subcontractor has been threatened or intimidated, or in any way coerced. . . ."[105] The court also found: ". . . The defendants established the bid depository primarily to eliminate bid peddling. . . ."[106]

In other words, the Government failed to prove to the satisfaction of the court (1) any ill intent and (2) any restraints, especially coercion or boycott, beyond those inherent in the depository rules.[107] As to the latter, the court concluded, as a matter of law:

> "The adoption and enforcement of the bid depository rules other than rules 6, 8 and 12B, do not constitute a boycott, nor do they singly or collectively constitute any unreasonable re-

[104] "The main thrust of the Government is against the establishment and operation by the defendants of the bid depository in accordance with [its] rules." Finding of Fact No. 23.

[105] Finding No. 55.

[106] Finding No. 54.

[107] With respect to both intent and extraneous restraints the Bakersfield situation thus assumed a complexion radically different from the Las Vegas and Northeast Texas Chapter situations, discussed supra. A detailed comparison of those opinions, therefore, is impracticable.

straint of trade, nor are they *per se* violations of the Sherman Act."[108]

In his Order of December 31, 1957, Judge Jertberg had explained why he considered rules 6, 8 and 12B to be price-fixing and illegal per se. He went on to say (p. 8): "The remaining rules are reasonable and were designed to correct evils which existed in the Bakersfield trade area prior to the establishment of the bid depository." Thus, the Government was entitled to relief only with respect to the bid depository rules 6, 8 and 12B, which provided, respectively, (1) that separate bids must be submitted for plumbing and for heating and ventilating, and combination bids must not be lower by more than five percent than the separate bids added together; (2) that successful bidders shall pay depository fees of one percent on each of the contracts for plumbing, for heating and ventilating, for sheet metal, and for electrical work, up to a maximum of $1,000 on each such contract; and (3) that between the time of opening and the time when bids are made available to general contractors, the bids may be withdrawn upon payment of one percent of the quoted price, up to a maximum of $1,000.

Judge Jertberg's judgment of May 26, 1958, enjoined the defendants from continuing, reviving, or renewing "the aforesaid combination and conspiracy,"[109] and from adopting, enforcing, or continuing in effect any of the provisions of rule 6, rule 8, or rule 12b, or any rule which (1) requires submission of separate bids for plumbing or separate bids for heating and ventilating; (2) limits the price at which a combination bid may be submitted; (3) requires that the successful bidder through the depository shall pay any fee; and (4) permits withdrawal of any bid between bid opening and delivery of bids to any general contractor.

Against the background of general principles and precedents discussed hereinabove, it appears that Judge Jertberg's approach bears some resemblance to that of Chief Justice Stone in *Maple Flooring Association v. United States.* Failing, like Chief Justice Stone, to find any restraints or abuses outside the depository rules, Judge Jertberg considered whether those rules amounted to illegal restraints (as it were, "of necessity," as the late Chief Justice had put it). Unlike Chief Justice Stone, Judge Jertberg dealt with the

[108] Conclusion of Law No. 3.

[109] That combination and conspiracy, it must be remembered, was limited, in the court's view, to the adoption and enforcement of the three specific rules discussed in the text, supra, and did not cover the depository rules in their entirety.

plan not in its entirety but considered its parts separately. Also unlike Chief Justice Stone, he in essence upheld a plan which, in his own opinion, had contained illegal features and opportunities for abuses.

The relief provided for by Judge Jertberg was limited but consistent with his view of the case. Matters, however, did not rest there. He inserted a proviso into the judgment whereby the defendants, within one year after entry of that judgment, could submit to the court a new plan for operation of the depository which, if approved, would cause the court to "modify" the judgment "to permit the operation of a bid depository in accordance with such plan or modification thereof." No burden was put upon defendants to show need for such modification. The defendants were prompt in availing themselves of that privilege. The result was a "Modified Final Judgment," dated December 22, 1958, by Judge Yankwich, who had not participated in the trial of the case. That modified judgment reiterates the conclusion of Judge Jertberg that defendants combined and conspired in violation of the Sherman Act by adopting and enforcing rules 6, 8 and 12B, and it reiterates also Judge Jertberg's injunctions against reviving or continuing those rules, against the requirement of separate bids, and against price limitations on combined bids. Judge Jertberg's prohibition against payments of any fees by successful bidders through the depository has been changed into a prohibition against such fees if, in the aggregate, they exceed the "amount reasonably required for the operation and maintenance of such bid depository." [Section IV (a) (iii)]. Instead of Judge Jertberg's outright prohibition against withdrawals of bids during the interval of time between opening and submission to general contractors, we now find injunctions only against coercion and collusion to cause such withdrawals and against giving or accepting any money for such withdrawals [Section IV (c) and (d)].

Judge Yankwich added a new section IV-A, requiring that bid openings by the depository be conducted upon advance notice to interested general and subcontractors, and that the results be announced to those who attend the bid opening.

Attached as an exhibit to the Modified Final Judgment is the defendants' new depository plan which, Judge Yankwich says (in section IV B): ". . . does not violate the antitrust laws of the United States, *provided that the defendants in so operating shall, in all other respects, be subject to all of the provisions of this judgment.*" [Emphasis supplied.] In accordance with the court's injunction,

rule 6 of this new plan omits the previous requirement for separate bids on different types of work and the price limitation on combination bids. Taking advantage of the fact that the modified, in contrast to the original, judgment does not absolutely prohibit fee payments by successful bidders, the new rule 8 simply cuts those fees, which had been found to be illegal, from one to one-half percent for each contract, and reduces the maximum fee from $1,000 to $250. Apparently, Judge Yankwich was convinced that such payments do not exceed "the amount reasonably required for the operation" of the depository. Judge Jertberg might have considered this new version of rule 8 contrary to the tenor of his original judgment. More curiously, rule 12B, which both judgments specify as one of the rules which are conspiratorial and illegal, is *verbatim* the same in the new and in the old plan. There is no change with respect to withdrawals of bids between opening and submission to general contractors, and no change in the penalty for such withdrawals. This rule, condemned though it was and is, now also is approved by the court, because Judge Yankwich thought his injunctions against collusive practices in connection therewith make it harmless.[110] The technical workmanship of the final disposition of the *Bakersfield* case shows similarities to that of a Rube Goldberg contraption. Uninformed persons reading the approved rules of the Bakersfield depository may easily overlook the fact that the court's approval has been limited, or supplemented, by "all of the provisions in this judgment." Those provisions require that the opening of the bids be done in public, and they include various injunctions, especially against collusive use of the rules. They also include the usual visitation rights for representatives of the Department of Justice, as well as retention of jurisdiction in the court.

Whatever may be said in explanation or defense of the *Bakersfield* judgments, it is submitted that these criticisms remain:

(1) There is no detailed discussion or evaluation of the restrictive depository rules which the court upheld, no specification or evaluation of the "evils" which those rules were deemed to combat, much less an explanation of the reasons or weighing processes by which the court arrived at the conclusion that the remaining restrictions are preferable to the previous "evils." Since those unspecified "evils" probably include bid peddling and bid shopping practices, the unwarranted inference is created that all such practices are evil, under any circumstances.

110 The Department of Justice, upon hearing on the proposed new rules, objected to the retention of rule 12B, especially to the continued provision for penalties. It also objected to the retention of fee payments, if at a reduced scale, in new rule 8.

(2) The trial judge failed to grasp the tying character of the following provision in rule 6, which has not been vitiated by either the original or the modified final judgment:

> "All bids are to be submitted to the depository upon condition that either the plumbing, or heating and ventilating, or sheet metal or electrical portion of any bid may be used by the general contractor with any other plumbing, or heating and ventilating, or sheet metal or electrical bid or portion of a bid, *submitted through the depository.*" [Emphasis supplied.][111]

In other words, if a general contractor uses the bid depository for work on one phase of those mechanical specialties, he must use it for all work on any of those mechanical specialties. It is difficult to see why this tying provision, which appears to run counter to section 3 of the Clayton Act, is necessary to combat the evils of bid peddling or bid shopping. There is no discussion by the court on this clause, although it was argued by the Government.

(3) Rule 10 of the depository provides that when bids for a specific project are once opened, there shall be no bidding on that project for a period of 120 days by contractors who failed to bid in the first instance (unless the plans and specifications have been revised in an amount exceeding 25 percent of the work or materials prescribed in the original plans and specifications). The defendants argued that the original bidders, who had gone to considerable expense in preparing their bids, should be protected against subsequent bidders, even though the awarding authority may have rejected the general contractor's original bid because the price was too high. This rule, as the Government pointed out, has nothing to do with bid peddling. As a renunciation to compete by those who did not participate in the first bidding, this rule amounts to an outright agreement in restraint of trade. Its purpose apparently is to induce subcontractors to participate in the depository procedure, since otherwise they lose their chance on a possible rebid. The court sustained rule 10, without stating specific reasons. It is submitted that this rule should have been enjoined because (a) it is unduly restrictive in itself; (b) it tends to compel members to bid through the depository; and (c) it is not justified as a measure against unethical bid peddling.

111 This tie-in is further strengthened by rule 11, reading: "All plumbing, heating and ventilating, sheet metal and electrical bids shall be submitted upon the condition that the bid may be used only in combination with a plumbing, heating and ventilating, sheet metal or electrical bid which has been submitted through the depository. Said condition of bid will be printed upon the bid form provided by the depository."

(4) The provisions in rule 12B for penalties payable to the depository in cases of bid withdrawals are not made sufficiently harmless by Judge Yankwich's injunctions against collusive exercise of the bid withdrawal privilege. Rule 12B clearly tends to increase prices. For one thing, bidders will be extra careful to avoid bidding so low as to risk the necessity of withdrawal. For another thing, even a sound bid might be withdrawn, if the bidder finds that it is way below his competitors' bids and likely to arouse their resentment. General business relationships, *esprit de corps,* or other considerations may prompt such voluntary withdrawals. The injunctions of the modified judgment against collusive withdrawals are not applicable to those withdrawals. On the other hand, complete freedom to withdraw bids may invite frequent elimination of low bids and even collusive practices, despite the injunctions. One solution of those seemingly conflicting considerations might be to permit withdrawal only if a bid is based on a bona fide error. Such error should have to be demonstrated and explained, perhaps to a special committee. Since, as a practical matter, the showing of an error could not require elaborate proof or procedures, a further deterrent in form of moderate penalties might be provided for. It is not illogical to pay for an error. However, such penalties should be payable not to the depository but to the awarding authority. The depository suffers no harm by withdrawal of a low bid. Payment to the awarding authority would partly compensate it for the higher prices of the other subcontractors. That solution would be in the interest of the public, which bid depositories are supposed to serve.

VI. SUMMARY AND CONCLUSIONS

From the foregoing analysis, a number of things are clear. The typical bid depository arrangements in the building and specialty contractors' trades are subject to federal jurisdiction under the Sherman Act. Numerous depositories were organized and operated in the past twenty or more years. Normally, at least one of the purposes of such depositories is the inhibition of so-called bid shopping and bid peddling. In numerous instances, including all instances in which the Antitrust Division instituted proceedings, bid depositories had further anticompetitive purposes or effects, at least according to the Antitrust Division's pleadings. Such depository plans included per se violations of the Sherman Act, e.g., price-fixing and group boycotts. They also included arrangements with labor or other groups to help enforce the depository rules. When-

ever depositories organize groups with the aim of foreclosing others from competing for business, there can be no doubt that they violate the law.

A different problem is represented by depository organizations which, without directly aiming at the exclusion of competitors from a market and without otherwise violating the Sherman Act per se, seek to prevent bid peddling and bid shopping by compulsory restrictions upon their participants. Such compulsory rules may vary greatly in scope and intensity. They may amount to relatively mild and unimportant encroachments upon freedom in business conduct; for instance, they may require bid copies to be filed at a certain place and date, or payments to be made toward the cost of administration. Anyone entering, free from coercion, an agreement to do things of that type will hardly be considered to have restrained trade unreasonably.

Other instances of compulsory rules may attempt to regulate vital phases in the business conduct of their participants and, by virtue of their nature and intricacy, amount to something like regimentation. The more intricate and far-reaching such rules are, the more likely will they provide also for penalties against infractions. The evaluation of such compulsory arrangements, in the absence of per se violations, requires that all facts and circumstances of the specific situation be taken into account. However, since group power and group activities are involved, the borderline of legality as established by Supreme Court precedents surrounds such schemes rather tightly. The *Bakersfield* plan falls into this category. With due respect to the eminent judge who wrote the Modified Final Judgment, it is submitted that the plan which he approved is unduly restrictive by generally accepted standards of reasonableness.

The Antitrust Division has taken a stern but not inflexible position toward depositories, as is apparent from the record. However, it probably will not interpret the *Bakersfield* judgment to mean that most any depository arrangement is legal if only it serves the prevention of bid shopping and bid peddling and shows no per se illegal restraints. By Judge Yankwich's own reasoning, a close emulation of the Bakersfield system by other groups would not necessarily keep such other groups within the boundaries of the law. For such other groups would not, at the same time, be subject to injunctions, to inspection by the Department of Justice, and to a retained jurisdiction in court. Beyond that, different courts may have different views of what is, and what is not, justified

in the interest of prevention of bid shopping. While the *Bakersfield* court heard several witnesses on the "evils" of such practices, general experience and the abundant testimony from representatives of divergent interests before numerous committees of Congress make utterly unacceptable the premise that all dealings which some trade circles call bid shopping or bid peddling necessarily are unethical, undesirable, or superfluous. There is good evidence that under certain circumstances such dealings are beneficial or even necessary, for instance, in cases of alternate specifications.[112] It cannot be gainsaid that bargaining for price reductions is price competition. Adherents to a depository plan must bear the burden of showing that it is aimed only at discouraging irresponsible bargaining techniques by reasonable means.

There are other factors which should be taken into account in any particular situation. One is the size and composition of the organized group or groups. As the *Bakersfield* plan illustrates, the combination of different specialty contractors in one depository may lead to tying arrangements. Another factor is the past behavior of the parties involved. An established proclivity to wrongdoing is a valid reason for more stringent scrutiny by courts and law-enforcing agencies. Yet another factor is the nature and structure of the trade involved. A field in which generally there is considerable competition will be less restricted by a depository than a non-competitive field. Small businesses may be less able than larger ones to bear the possible waste of expenditures on estimates; and the average amount of such expenditures will be greater in some trades than in other trades. Mechanical specialty contractors may have better over-all reasons for arranging depositories than many other tradesmen. Among those reasons is the fact that, generally, they comprise relatively small businesses which are faced with the usually greater power of general contractors.[113]

Depositories should be accessible to all who want to use them. No subcontractor or general contractor or owner should be re-

[112] Note that even the Bakersfield plan, in rule 10, appears to leave some elbow-room for post-bidding negotiations, if only for those who bid on the project in the first instance. The 120-day freeze on negotiations there provided is binding only upon contractors who did not so bid. For a discussion of reasons against binding general contractors firmly to first-round subbids, see Schulz, "The Firm Offer Puzzle," 19 UNIV. CHI. L. REV. 237 at 260 (1952).

[113] In 1955, the executive vice-president of NECA produced a table listing all mechanical specialty contractors, by lines of business and by states, totalling 87,004. That table is printed in S. Hearings Before a Subcommittee of the Committee on the Judiciary on S. 1644, 84th Cong., 1st sess., pp. 221-222 (1955). The same witness testified, in 1957, that there existed more than 15,000 electrical contractors, most of whom do a business of less than $250,000 per year. He also testified that approximately an average of 40% of total

quired to deal exclusively through the depository, but the choice to use it should be open for any given job. Once the path through the depository has been taken by anyone, he may be bound to follow the depository procedure to the end of that particular job, provided that such procedure is not unreasonably restrictive. Fees adequate for the maintenance of the depository may be collected. Penalties for infractions payable to the depository should be looked at askance. Handling of the depository should be left to an agency independent of the trades involved. Opening of bids should be public and subject to advance notice to interested parties. Withdrawals of bids between opening and submission to general contractors or owners should be permitted only if the bidder can demonstrate an error in compiling the bid. Stipulations against further negotiations after the "first-round" bidding should not bind subcontractors who did not participate in such bidding on the particular job at hand. Those who did so participate might be prohibited from seeking the use of the depository on the same job, for a very limited time.

The principal sanction on which depositories should rely is the force of public opinion, i.e., opinion within the trades involved.[114] Interested general and subcontractors may be expected to learn eventually why a particular job was not awarded to the low bidder through the depository. If the reasons and circumstances of the award to some one else were truly reprehensible and unethical, the reputation of the offending firms will be damaged. By the same token, if there were valid reasons for by-passing the lowest bidder through the depository, ethics and reputations will not be involved. Since one cannot justly condemn all so-called bid peddling and bid shopping, that variable regulation by force of informed opinion appears to be best suited to the problem. The legitimate purpose of such depositories would be frustrated, of course, if the publication of subbids were used for testing compliance with an illegal scheme for fixing prices, rotating bids, or otherwise violating the law. If anyone suffers discrimination because he deviated from such a scheme, he should have recourse to law enforcing agencies.

construction costs, at least on federal jobs, are accounted for by costs of mechanical specialty work. H. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 3241, etc., 85th Cong., 1st sess., pp. 25-26 (1957).

114 The executive vice-president of NECA testified in Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 848 and Similar House Bills, 83d Cong., 1st sess., p. 28 (1953): "The contractors and subcontractors involved are subject to the force of public opinion on private work where the contractor and subcontractor usually move in the same business circles."

TABLE OF ANTITRUST CASES ON BID DEPOSITORIES

CASES	Antitrust Division Blue Book Number	CCH or Federal Reporter Citation	Involved a Conspiracy in Unreasonable Restraint of Trade, including:									Prohibition in Decree Against Continuation of Bid Depository		Consent Decree	Litigated Decree	Fines Imposed
			Price-Fixing or Bid Rigging	Market or Customer Allocation	Coercion or Boycott of				Participation by Groups of			Absolute	Qualified as to Purpose or Effect of Depository			
					Labor Groups	Customers*	Suppliers	Competitors	Labor Groups	Customers*	Suppliers					
U.S. v. Voluntary Code of Heating, Piping and Air Conditioning Industry of Allegheny County, Pa. (Civ. No. 698, W.D. Pa. 1939)	468	1932-1939 Trade Cas. ¶55,253	X			X	X	X	X				X	X		
U.S. v. Engineering Survey and Audit Co., Inc. (Civ. No. 276, Crim. No. 19853, E.D. La. 1940)	470 and 497	1940-1943 Trade Cas. ¶56,019	X										X	X		X
U.S. v. San Francisco Hardwood Floor Contractors' Assn. (Crim. No. 26824, N.D. Cal. 1939)	473	Not reported	X					X	X							X
U.S. v. Plumbing and Heating Industries Administrative Assn. (Civ. No. 5226, D.C.D.C. 1939)	476	1932-1939 Trade Cas. ¶55,256	X					X	X				X	X		
U.S. v. Union Painters Administrative Assn. (Civ. No. 5225, D.C.D.C. 1939)	477	1932-1939 Trade Cas. ¶55,257	X					X	X				X	X		
U.S. v. Excavators Administrative Assn. (Civ. No. 5227, D.C.D.C. 1939)	478	1932-1939 Trade Cas. ¶55,258	X					X	X				X	X		
U.S. v. Master Plasterers' Assn. of San Francisco (Crim. No. 26,848-S, N.D. Cal. 1939)	479	3 Trade Reg. Rep. (8th ed.) ¶15082	X					X	X							X
U.S. v. Heating, Piping and Air Conditioning Contractors Assn. of Southern California (Civ. No. 1642-Y, Crim. No. 14250-Y, S.D. Cal. 1940, 1941)	486 and 628	1940-1943 Trade Cas. ¶56,146; 33 F. Supp. 978	X			X	X	X	X				X	X		X
U.S. v. Harbor District Chapter, NECA (Civ. No. 1677-RJ, Crim. No. 14280-Y, S.D. Cal. 1940)	492 and 629	1940-1943 Trade Cas. ¶56,159	X			X		X	X				X	X		X
U.S. v. Southern California Marble Assn. (Civ. No. 1254-H, Crim. No. 14279-H, S.D. Cal. 1940)	493 and 567	1940-1943 Trade Cas. ¶56,089	X	X			X	X		X		X		X		X

U.S. v. Santa Barbara County, Chapter, NECA (Civ. No. 1678-H, Crim. No. 14286-Y, S.D. Cal. 1940)	499 and 630	1940-1943 Trade Cas. ¶56,153	X		X	X	X	X	X			X		X		X
U.S. v. Marble Contractors' Assn. (Civ. No. 805, W.D. Pa. 1940)	500	1940-1943 Trade Cas. ¶56,020	X					X	X				X	X		
U.S. v. Pittsburgh Tile and Mantel Contractors' Assn. (Civ. No. 806, W.D. Pa. 1940)	501	1940-1943 Trade Cas. ¶56,021	X					X	X				X	X		
U.S. v. Mason Contractors' Assn. of the District of Columbia (Civ. No. 6169, D.C.D.C. 1940)	504	1940-1943 Trade Cas. ¶56,015	X					X	X				X	X		
U. S. v. Harbor District Lumber Dealers Assn. (Civ. No. 1401-Y, Crim. No. 14302-H, S.D. Cal. 1940)	506 and 590	1940-1943 Trade Cas. ¶56,110	X	X		X	X	X					X	X		X
U. S. v. Employing Plasterers' Assn. of Allegheny County (Civ. No. 840, W.D. Pa. 1940)	507	1940-1943 Trade Cas. ¶56,025	X					X	X				X			
U.S. v. Brooker Engineering Co. (Civ. No. 3146, Crim. No. 25,692, E.D. Mich. 1940, 1942)	508 and 679	1940-1943 Trade Cas. ¶56,183	X	X		X		X	X			X		X		X
U.S. v. Associated Plumbing and Heating Merchants (Crim. No. 45270, W.D. Wash. 1940)	518	38 F. Supp. 769	X				X	X	X							X
U.S. v. Tile Contractors' Assn. of America, Inc. (Civ. No. 1761, N.D. Ill. 1940)	533	1940-1943 Trade Cas. ¶56,044	X				X	X	X			X				
U.S. v. Associated Marble Companies (Civ. No. 21848-L, Crim. No. 26976-L, N.D. Cal. 1940, 1941)	537 and 604	1940-1943 Trade Cas. ¶56,136	X	X		X						X		X		X
U.S. v. St. Louis Tile Contractors' Assn. (Civ. No. 521-2, Crim. No. 21552, E.D. Mo. 1940)	543 and 526	3 Trade Reg. Rep. (8th ed.) ¶15,096	X			X	X	X	X			X		X		X
U.S. v. Detroit Tile Contractors' Assn. (Civ. No. 1962, E.D. Mich. 1940)	545	1940-1943 Trade Cas. ¶56,053		X		X	X	X	X		X	X		X		
U.S. v. Northeast Texas Chapter, NECA (Crim. No. 11952, N.D. Texas 1949)	919	1950-1951 Trade Cas. ¶62,596; 181 F. (2d) 30	X			X	X	X			X					X
U.S. v. Reno Merchant Plumbing and Heating Contractors, Inc. (Civ. No. 868, D.C. Nev. 1952)	1027	1952-1953 Trade Cas. ¶67,361	X			X		X					X	X		
U.S. v. Las Vegas Merchant Plumbers Assn. (Crim. No. 12173, Civ. No. 939, D.C. Nev. 1951)	1070 and 1080	1955 Trade Cas. ¶68,024; 210 F. (2d) 732, cert. den. 348 U.S. 817	X	X			X	X	X				X	X		X

*Customers signifies general contractors, owners or awarding authorities.

TABLE OF ANTITRUST CASES ON BID DEPOSITORIES—Continued

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					Labor Groups	Customers*	Suppliers	Competitors	Labor Groups	Customers*	Suppliers					
U.S. v. Detroit Sheet Metal and Roofing Contractors Assn., Inc. (Civ. No. 12433, Crim. No. 33452, E.D. Mich. 1955, 1953)	1149 and 1153	1955 Trade Cas. ¶67,986; 1953 Trade Cas. ¶67,596	X	X				X			X	X		X		X
U.S. v. Bakersfield Associated Plumbing Contractors, Inc. (Civ. No. 1479-N.D, S.D. Cal. 1958)	1242	1958 Trade Cas. ¶69,087 and 1959 Trade Cas. ¶69,266				X		X		X			X		X	
U.S. v. Arizona Consolidated Masonry and Plastering Contractors' Assn. (Civ. No. 3066-PHX, Crim. No. C-15290, D.C. Ariz. 1959)	1449 and 1450		X		X	X		X				Pending				